U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11283942

Date: NOV. 24, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a physical therapist under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After the filing's initial grant, the Director of the Nebraska Service Center revoked the petition's approval. The Director concluded that the Petitioner did not establish its ability to pay the proffered wage for the offered position.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes physical therapists. *Id*. Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089, Application for Permanent Employment Certification, from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA 9089 in duplicate. *See* 8 C.F.R. § 204.5(a)(2); *see also* 20 C.F.R. § 656.15.

Section 205 of the Act, 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). A notice of intent to revoke (NOIR) "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying

the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Per *Matter of Estime*, "[i]n determining what is 'good and sufficient cause' for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof." *Id.*

II. ANALYSIS

The Petitioner is a provider of healthcare services with ten employees. The priority date of the petition is the date of filing with USCIS, which in this case is December 29, 2014. *See* section 8 C.F.R. § 204.5(d). The proffered wage is $64,813 per year.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated in the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

This petition was initially approved on February 8, 2016. The Director later determined that the record did not contain any regulatory evidence of the Petitioner's ability to pay the proffered wage from the time of the December 29, 2014 priority date. Therefore, the Director issued the NOIR on November 5, 2019 for good and sufficient cause. Specifically, the NOIR noted, "Please remember that your response must show ability to pay from the priority date of December 29, 2014, through the present." In response to the NOIR, the Petitioner submitted its 2013 and 2014 federal income tax returns, but nothing for any year subsequent to 2014.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

In this case the labor certification states that the Beneficiary was working for the Petitioner from October 2012 until at least the priority date, as a physical therapy director. The record includes the Beneficiary's pay stubs from September 21, 2014 through December 13, 2014, reflecting that the Petitioner paid the Beneficiary year to date wages in 2014 of $36,743.15. The record does not include evidence that the Petitioner paid the Beneficiary wages at any other time despite its claim of employing

the Beneficiary since October 2012 onward. Further, the record does not include any IRS Form W-2, Wage and Earning Statement, or other payroll records to confirm the accuracy of the Petitioner's pay to the Beneficiary.

Therefore, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date of December 29, 2014 based on wages paid to the Beneficiary.

If a petitioner did not pay a beneficiary the full proffered wage, we will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage that year.

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, for 2013 and 2014. If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation"). USCIS will also consider net current assets (or liabilities). This is determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18, respectively, of Schedule L.[1] In this case, the tax return reflects that the Petitioner had net income of $41,746 in 2013,[2] and $10,746 in 2014, and net current assets of $42,409 in 2013, and $52,738 in 2014.

Accordingly, the Petitioner has established its ability to pay the difference between the proffered wage and wages already paid to the Beneficiary only in 2014. The record does not include evidence of the Petitioner's ability to pay the proffered wage for any additional years after 2014, particularly for 2015, as that would show evidence of whether the Petitioner could pay the proffered wage after the December 29, 2014 priority date. The Director specifically requested evidence to reflect the Petitioner's "ability to pay from the priority date of December 29, 2014, through the present." Therefore, as the Petitioner did not send the requested evidence for other years, the Director properly revoked the petition's approval as the Petitioner did not establish its continuing ability to pay the proffered wage.

On appeal, the Petitioner states that it operated from 2013 to 2017, but does not submit tax returns, annual reports, or audited financial statements for 2015 onward.[3] The Petitioner states that "the

[1] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).
[2] The Petitioner's 2013 tax return is for a time period before the December 29, 2014 priority date but will be considered generally.
[3] A search of the Illinois Secretary of State, Certificate of Good Standing, website reveals that the Petitioner's business

previously submitted tax returns and wage reports show that the gross income ... is over $700,000 per year." We do not consider a petitioner to have established its ability to pay the proffered wage based on its income without deducting its expenses.[4] Further, although referenced in its appeal, the record does not include the Petitioner's wage reports for any year.

The Petitioner asserts that its net income and net assets are an inaccurate basis for the company's ability to pay wages because the shareholders distributed the net income equally, and "most of the expenses are to pay employees' salaries." While the tax returns reflect equal distribution of the Petitioner's net income to its seven shareholders in 2014, the record does not include any regulatory prescribed evidence to demonstrate the Petitioner's continuing ability to pay the proffered wage beyond 2014.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the Petitioner's business dissolved in 2017 and there is no evidence in the record to demonstrate the Petitioner's financial situation from 2015 until its dissolution despite the Director's specific request for such evidence.[5] The record contains only the Petitioner's tax returns in 2013 and 2014. As noted, the 2014 tax return reflects minimal net income and only slightly more in net current assets. Further, the Petitioner's tax returns demonstrate a decrease in net income from 2013 to 2014. The Petitioner has not submitted evidence of any uncharacteristic business expenses or losses in any year. In the totality of the circumstances, the Petitioner has not established its ability pay the proffered wage from the priority date.

In response to the NOIR and on appeal, the Petitioner indicates that the Beneficiary has a new employment offer from a different U.S. employer. As such, the Petitioner requests reinstatement of the Form I-140 approval to allow the adjudication of the Beneficiary's concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status.

---

was incorporated on [redacted] 2011 and dissolved on May 12, 2017. *See* Office of the Illinois Secretary of State available at https://www.ilsos.gov/corporatellc/CorporateLlcController (last accessed September 3, 2020). The Petitioner does not explain how it was incorporated in 2011 but only began operating in 2013. Nor does the Petitioner explain how it could have employed the Beneficiary in 2012 if it did not begin operating until 2013. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

[5] The regulation at 8 C.F.R. § 103.2(b)(14) states that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

The regulation at 8 C.F.R. § 204.5(e)(5) provides:

> A petition filed under section 204(a)(1)(F) of the Act for an alien shall remain valid with respect to a new employment offer as determined by [U.S. Citizenship and Immigration Services (USCIS)] under section 204(j) of the Act and 8 C.F.R. § 245.25. An alien will continue to be afforded the priority date of such petition if the requirements of paragraph (e) of this section are met.

An adjustment of status applicant may affirmatively demonstrate to USCIS, on Form I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability, that he or she has a new offer of employment from a different U.S. employer in the same or similar occupational classification, provided that the application to adjust status has been pending for 180 days or more, and the qualifying immigrant visa petition has already been approved, or is subsequently approved. *See generally*, 8 C.F.R. § 245.25(a). A pending immigrant petition will be approved if it was eligible for approval at the time of filing and until the applicant's adjustment of status has been pending for 180 days, unless approval of the qualifying immigrant visa petition at the time of adjudication is inconsistent with a requirement of the Act or another applicable statute. 8 C.F.R. § 245.25(a)(2)(B)(2).

As discussed above, the record does not establish that the Petitioner had the continuing ability to pay the proffered wage from the December 29, 2014 priority date, therefore, the I-140 will not be reinstated. In order for the Beneficiary to benefit from the Act's job portability provisions, the pending Form I-140 must be approved, and it may only be approved if the record shows that the Petitioner met the ability to pay requirement at the time of filing. *See* 8 C.F.R. § 245.25(a)(2)(B)(*1*); *see Herrera v. USCIS*, 571 F.3d 881, 887 (9th Cir. 2009) (explaining that, "in order for a petition to 'remain' valid, it must have been valid from the start"); *see also Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010) (holding that a beneficiary of a portable petition must have been "entitled" to the requested classification). [6]

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward. It is the Petitioner's burden to establish eligibility for the immigration benefit sought.

[6] Further, the record does not reflect that the Beneficiary has submitted a Form I-485 Supplement J with supporting documentation in relation to his I-485 application and therefore has not affirmatively demonstrated to USCIS that he has a new employment offer in the same or similar classification. The Director must make the job portability determination in the course of adjudicating the Form I-485, and will do so only if the Beneficiary files a Form I-485 Supplement J in accordance with the form instructions, and porting allowed only if the instant immigrant petition is ultimately approved. Therefore, we will not discuss whether the Beneficiary is required to submit Form I-485 Supplement J, or whether the Beneficiary remains employed in a same or similar occupation. *See generally*, 8 C.F.R. § 245.25. As of January 17, 2017, eligible beneficiaries must notify USCIS of their intent to port to new employment by filing a Supplement J to Form I-485, found at https://www.uscis.gov/i-485supj. *See* USCIS Policy Memorandum PM-602-0152, *Guidance on Notice to, and Standing for, AC21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* (Nov. 11, 2017), https://www.uscis.gov/legal-resources/policy-memoranda. Here, although the Petitioner's business dissolved after January 17, 2017, the Petitioner does not provide the date on which the Beneficiary changed his employer.

Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.